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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 James Glenn, Jr.,

10 Plaintiff,

11 v.

12 Wells Fargo Bank NA, et al.,

13 Defendants.
14

No. CV-19-08080-PCT-MTL

ORDER

15
16 Plaintiff James Glenn, Jr. moves for a remand of this action to the Arizona Superior
17 Court. (Doc. 8.) The motion is fully briefed. For the reasons explained below, the Court
18 grants Mr. Glenn's motion.¹

19 **I. FACTUAL BACKGROUND**

20 Mr. Glenn's Amended Complaint alleges that on September 6, 2018, he was injured
21 in the parking lot of a Wells Fargo Bank branch in Flagstaff, Arizona. Mr. Glenn, an
22 Arizona citizen, and his son arrived at Wells Fargo in his son's vehicle. Mr. Glenn's son
23 was driving, and Mr. Glenn was the passenger.

24 After his son parked, Mr. Glenn exited the vehicle and began walking toward the
25 branch entrance when "he tripped on a piece of rebar sticking out of the parking lot
26 asphalt." (Amended Complaint ¶ 18 (Doc. 1-3).) The rebar was intended "to hold the
27 concrete parking space bumper in place, however, the concrete parking space bumper was

28 ¹ Oral argument is unnecessary because the issues are fully briefed and oral argument
would not have aided the Court's decision. *See* Fed. R. Civ. P. 78(b); LRCiv 7.2(f).

1 *behind* the rebar, leaving it exposed.” (*Id.* ¶ 19) (emphasis in original.) Mr. Glenn alleges
2 that he “suffered serious injuries, including a fractured right hip.” (*Id.* ¶ 20.)

3 The Amended Complaint further alleges that, while Mr. Glenn was waiting for
4 medical care to arrive at the scene, Mr. Glenn’s son had a conversation with Roxanne
5 Presmyk. She is the Wells Fargo branch’s services manager and an Arizona citizen. Ms.
6 Presmyk allegedly told Mr. Glenn’s son that “she and other employees of the Wells Fargo
7 branch located at the premises were aware of the exposed rebar and were aware [that] a
8 dangerous condition existed.” (*Id.* ¶ 22.) Ms. Presmyk allegedly told Mr. Glenn’s son “that
9 someone was to ‘take care of’ or ‘fix’ the concrete parking space bumper, namely, to place
10 it back on the rebar, however, no one had done so.” (*Id.* ¶ 23.)

11 **II. PROCEDURAL HISTORY**

12 Mr. Glenn initiated this litigation in the Arizona Superior Court in Coconino County
13 on February 12, 2019. He filed an Amended Complaint on March 7, 2019. The Amended
14 Complaint names as defendants Wells Fargo Bank, CBRE, Inc., and Ms. Presmyrk.² The
15 Amended Complaint asserts various state law claims for relief against the defendants,
16 including negligence, gross negligence, premises liability, and respondeat superior.

17 Wells Fargo Bank filed a Notice of Removal in this Court on March 18, 2019. (Doc.
18 1.) The jurisdictional basis asserted in the Notice of Removal (at ¶ 9) is diversity of
19 citizenship under 28 U.S.C. § 1332. Mr. Glenn filed a Motion to Remand (Doc. 8) on
20 March 26, 2019, and briefing is complete.

21 **III. LEGAL ANALYSIS**

22 Under Article III of the United States Constitution, this Court’s exercise of judicial
23 power is contingent upon the presence of subject-matter jurisdiction. One such form of
24 jurisdiction is diversity of citizenship. U.S. Const. art. III § 2. Congress has established the
25 standard for diversity of citizenship jurisdiction in 28 U.S.C. § 1332. Diversity of
26 citizenship requires that the party seeking to invoke federal jurisdiction establish two
27 elements: that the amount in controversy exceed \$75,000 and that there be “complete

28 ² The Amended Complaint also names Ms. Presmyrk’s husband for the purposes of
Arizona law’s community property regime.

1 diversity” between each plaintiff and each defendant. *Caterpillar Inc. v. Lewis*, 519 U.S.
2 61, 68 (1996). In litigation where a complaint is initially filed in state court, such as this
3 one, a defendant may remove the case to federal court provided that federal subject-matter
4 jurisdiction exists. 28 U.S.C. § 1441.

5 Wells Fargo’s Notice of Removal acknowledges (Doc. 1 at ¶ 6) the lack of complete
6 diversity by virtue of Ms. Presmyk’s Arizona citizenship. The Notice of Removal,
7 however, raises (at ¶ 7) the so-called fraudulent joinder doctrine, asserting that “[Ms.]
8 Presmyk is an improper defendant and should be ignored for diversity purposes.”

9 The fraudulent joinder doctrine holds that a federal court may disregard the
10 citizenship status of a defendant whose inclusion in the complaint is a subterfuge for
11 defeating complete diversity. *Grancare, LLC v. Thrower by & through Mills*, 889 F.3d 543,
12 548 (9th Cir. 2018) (citing *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152
13 (1914)). When presented with a potential fraudulent joinder, a court should apply a general
14 presumption that the non-diverse defendant was properly joined. A party seeking to
15 overcome that presumption bears a heavy burden of proof to establish either “(1) actual
16 fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a
17 cause of action against the non-diverse party in state court.” *Id.* (quoting *Hunter v. Phillip*
18 *Morris USA*, 582 F.3d 1039, 1044 (9th Cir. 2009)). This test is not merely an application
19 of the standard for Rule 12(b)(6) motion to dismiss. *Id.* at 549. “A claim against a defendant
20 may fail under Rule 12(b)(6), but that defendant has not necessarily been fraudulently
21 joined.” *Id.*

22 In response to Mr. Glenn’s argument concerning Ms. Presmyrk’s status as a non-
23 diverse defendant, Wells Fargo simply restates the rule. (Doc. 14.) The brief does not
24 provide any explanation as to whether there was “actual fraud” concerning Ms. Presmyk’s
25 joinder as a defendant. Nor does the brief explain why Mr. Glenn would be unable to
26 establish a cause of action against Ms. Presmyk in state court. The only justification in the
27 record provided by Wells Fargo for its fraudulent joinder claim is in the Notice of Removal
28 in which Wells Fargo asserts (at ¶ 6) that Ms. Presmyk’s status as a citizen of Arizona

1 should be disregarded because she “is merely an employee of Wells Fargo Bank N.A. and
2 did not ‘create the condition’ nor did she maintain full management and control over the
3 subject property.” This threadbare explanation falls far short of the “heavy burden”
4 necessary to prevail on a fraudulent joinder argument.

5 By way of analogy, in *Grancare, LLC*, the Ninth Circuit Court of Appeals affirmed
6 a sanctions award against a removing defendant under 28 U.S.C. § 1447(c) where the
7 district court concluded that a non-diverse employee was properly joined in an action for
8 negligence against a nursing home. 889 F.3d at 551. The complaint in *Grancare, LLC*
9 alleged specific instances of conduct where the employee failed to exercise due care, giving
10 rise to potential liability for negligence and elder abuse against that individual non-diverse
11 defendant. *Id.*

12 Like the complaint that was remanded in *Grancare, LLC*, Mr. Glenn’s Amended
13 Complaint recites allegations against Ms. Presmyk that, if true, set forth a “possibility that
14 a state court would find that the [Amended] [C]omplaint states a cause of action against
15 [her].” *Id.* at 549 (quoting *Hunter*, 582 F.3d at 1046) (emphasis in original). To that end,
16 the Amended Complaint alleges (at ¶¶ 22-23) that Ms. Presmyk had knowledge of the
17 exposed rebar in the parking lot and that she was also aware that the condition needed
18 repair. The Amended Complaint further alleges (at ¶ 24) that Ms. Presmyk held a
19 management position in the branch office and had a responsibility to warn its customers of
20 the exposed rebar. Moreover, the Amended Complaint alleges (at ¶¶ 22-23) that she failed
21 to take measures to warn customers of the exposed rebar.

22 Taken together and with the other allegations therein, the Amended Complaint sets
23 forth a theory of liability under Arizona law and against Ms. Presmyk based on her job
24 responsibilities, her actions and omissions, and the injuries suffered by Mr. Glenn. Based
25 on these, a court of the State of Arizona could conclude that Mr. Glenn has stated a cause
26 of action against Ms. Presmyk.

27 **IV. CONCLUSION**

28 Wells Fargo has failed to overcome the presumption against fraudulent joinder and

1 it has also failed to show that Ms. Presmyk, an Arizona citizen, was joined as a defendant
2 to defeat diversity of citizenship. This Court lacks subject matter jurisdiction and it is
3 obligated to remand the case to the Arizona Superior Court in Coconino County.³

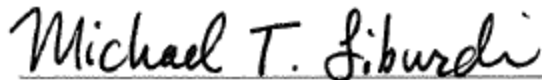
4 Based on the foregoing,

5 **IT IS ORDERED** that Mr. Glenn's Motion to Remand (Doc. 8) is **GRANTED**.
6 This case is remanded to the Arizona Superior Court in Coconino County.

7 **IT IS FURTHER ORDERED** that Roxanne Presmyk's Motion to Dismiss (Doc.
8 24) remains pending before the Superior Court.

9 **IT IS FURTHER ORDERED** that Wells Fargo and Ms. Presmyk's Motion to
10 Strike the Supplement to Motion to Remand (Doc. 45) is **DENIED** as moot because the
11 Court did not consider the supplement.

12 Dated this 10th day of October, 2019.

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15 Michael T. Liburdi
16 United States District Judge
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27 ³ Mr. Glenn also argues that remand is appropriate for another reason, that Wells Fargo
28 failed to obtain consent for removal from co-defendant CBRE, Inc. as required by 28
U.S.C. § 1446(b)(2)(A). (Doc. 8 at 7.) The Court need not resolve this issue because it
grants the remand motion on the independent basis that complete diversity does not exist.